SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 883

HARRY J. COMAN, an Attorney,

Petitioner,

v.

CHIEF COUNSEL OF THE JUDICIAL INQUIRY ON PROFESSIONAL CONDUCT, NASSAU COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner prays for review of an order of the Supreme Court, Appellate Division, State of New York, Second Department, denying a motion for common law writ of error *coram nobis*, which decision denied Petitioner's motion to vacate a prior order of the said Court disbarring Petitioner, entered on May 1, 1967. This decision became final when leave to appeal to the New York State Court of Appeals was denied (25 N.Y. 2d 739).

Jurisdiction

Jurisdiction for review is challenged in that the Petitioner has failed to demonstrate in what way the order appealed from impaired his rights and privileges. It is his claim that his constitutional rights have been violated by the underlying judgment of 1967, rather than by the order of 1969 appealed from.

Petitioner has attempted to obtain review by this Court of the 1967 decision, although he never raised any constitutional issue before this time and he never took an appeal in the State courts from that decision. Petitioner is now making a belated attempt to obtain a review of issues which appeared in the record below and were never challenged prior to this time.

Statement of Proceedings Below

In or about January 1964 the Judicial Inquiry commenced its investigation of the Petitioner. As a result of that investigation, by Order of the Appellate Division, Second Department, dated April 4, 1966, disciplinary proceedings were directed to be brought against Petitioner.

During the course of the investigation Petitioner voluntarily produced certain records and files pursuant to oral or written requests and subpoenas of the Judicial Inquiry.

At all times during the course of this investigation, as Petitioner concedes, he was represented by counsel.

After having been duly served with a copy of the Petition in this disciplinary action the issues therein raised were thereafter referred to the Hon. Bernard S. Meyer, Justice of the Supreme Court, for hearing and a report to the Appellate Division, Second Department (Order dated May 19, 1966).

On August 2, 1966 hearing of this action commenced with Petitioner present in court and represented by counsel.

On August 3, 1966 during the course of the hearing a request for an adjournment was made and received by Petitioner's counsel due to the fact that Petitioner had suffered a heart attack while present in court. Petitioner was then removed to a hospital for treatment.

Subsequently conferences by both counsel with the Court resulted in a stipulation as to the procedure to be followed as to the future course of this proceeding.

On October 3, 1966 in open court Petitioner, with his counsel present, stipulated that he would submit a written statement in his defense and in return would not be cross-examined by the Judicial Inquiry; the Judicial Inquiry also submitted a written statement to complete its case and in view of Petitioner's physical condition would introduce no further evidence, however, the Judicial Inquiry would have the opportunity to produce evidence or statements to rebut whatever was stated in the statement Petitioner was to file.

Petitioner's statement, dated September 30, 1966, sixty pages in length, was then received in evidence in lieu of his testimony.

By consent the matter was then adjourned to October 19, 1966 to permit a full review of Petitioner's statement in evidence and further, to determine the necessity for any further hearings in rebuttal.

On October 19, 1966, exercising its right to rebut pursuant to the above stipulation, Respondent took testimony from two former secretaries of Petitioner with respect to certain office procedures referred to in the statement, which testimony was subject to the right of cross-examination by Petitioner's counsel who was present at the hearing. The hearings were then concluded.

The Referee filed his report with the Appellate Division, Second Department, on December 29, 1966.

By Order of the Appellate Division, Second Department, dated May 1, 1967, Petitioner was disbarred from the practice of law. *No appeal was taken from this decision.*

Some two years later Petitioner, by notice of motion for a common law writ of error *coram nobis*, sought review of this decision and for the first time raised constitutional issues. Said motion was denied by an order of the Appellate Division (32 A.D. 2d 823) and a motion for leave to appeal to the New York Court of Appeals (25 N.Y. 2d 739) was also denied.

POINT I

An application in the nature of coram nobis is not available.

The writ of *coram nobis* presupposes violation of Petitioner's constitutional rights not appearing on the record, and no negligence which could be attributed to the Petitioner for the failure to have brought the alleged error to the attention of the Court at the time of trial. The proceeding is not a substitute for a new trial, appeal or other statutory remedy (Frank, *"Coram Nobis"*, 1953, p. 23). As stated in *People* v. *Brown*, 13 N.Y. 2d 201:

> "The writ of error coram nobis * * * is an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him. (People v. Howard, 12 N.Y. 2d 65, 66). In short, it is not a substitute for an appeal or for a motion for a new trial and, if any one of these procedures was, or could have been, invoked, the defend-

> ant may not thereafter seek to set aside a judgment of conviction by resorting to coram nobis. (citing cases)."

All the issues raised on this appeal, beginning with the Petitioner's claimed medical disability, together with all the alleged facts claimed to be constitutional violations, were in the record before the Court in the 1967 decision. No objection was made by either Petitioner or his counsel to the introduction of any of this evidence and further, no objection was made to preserve any of these claimed errors for future appeal. In fact, no appeal was ever filed by Petitioner until this time.

The decision in *People* v. *Brown* (*supra*) expounds a principle followed in the Federal courts (cf. Title 28, United States Code, Section 2255). In *Larson* v. *United States*, 275 Fed. 2d 673, 674, it was held that:

> "* * * the prisoner may not now substitute a proceeding under Section 2255 for the orderly appellate process he deliberately declined to use * * * years ago * * *."

See also *United States* v. *Marchese*, 341 Fed. 2d 782, cert. den. 382 U.S. 817, and *Black* v. *United States*, 269 Fed. 2d 38, cert. den. 361 U.S. 398.

We therefore respectfully submit that since the alleged violations of constitutional rights appear in the trial record the writ of error *coram nobis* does not extend to such a situation. In such circumstances the Petitioner is relegated to remedies afforded by way of appeal (*Matter of Hogan* v. *Court of General Sessions, New York County*, 296 N.Y. 1; *People* v. *Sadness*, 300 N.Y. 69; *People* v. *Howard*, 12 N.Y. 2d 65; *People* v. *Kendricks*, 300 N.Y. 544).

POINT II

There are no constitutional issues involved.

Prior to our discussion of the constitutional issues raised by the Petitioner in his motion, we respectfully submit that during the entire proceeding Petitioner acquiesced in the procedures adopted and made no attempt to raise the issues on an appeal.

Petitioner, however, first contends in his brief that by complying with the request of the Judicial Inquiry in the production of his records and files, his Fourth Amendment rights were violated in that he was a victim of an unreasonable search and seizure. At the outset this position is contradictory in that in his statements of defense on his behalf he admits and emphasizes the full cooperation given to the Judicial Inquiry during the course of the investigation in producing these records.

As a matter of law this issue has been decided in *Jones* v. *United States*, 258 Fed. 2d 420, 422, where the Court held:

> "Illegal search and seizure can not be raised by a petition for coram nobis nor can these points be raised under Section 2255."

In any event, even assuming that the production of the papers pursuant to requests can be equated with a seizure, there was nothing which contravened the provisions of the Fourth Amendment. The protection supplied by the Constitution is against *unreasonable* seizures. The standard for what is and is not reasonable is that of probable cause.

In the State of New York the Appellate Division of the Supreme Court has the right to order and conduct an investigation into an attorney's methods of practicing law (McKinney, Consolidated Laws of New York, Vol. 28,

Judiciary Law, Section 90). The right to subpoena follows as a matter of course. In issuing a subpoena a duly constituted investigative body is not required to make a preliminary showing of probable cause (*A'Hearn* v. *Committee on Unlawful Practice of Law*, 30 A.D. 2d 47, affirmed 23 N.Y. 2d 916, cert. den 395 U.S. 959). Since the use of a subpoena does not violate the recipient's constitutional rights, a request for records and delivery pursuant thereto cannot be characterized as an unreasonable seizure within the meaning of the Fourth Amendment. (See also, *Shapiro* v. *United States*, 335 U.S. 1.)

Petitioner further contends, in the light of *Spevack* v. *Klein*, 385 U.S. 511 and *Garrity* v. *New Jersey*, 385 U.S. 493, that he was compelled in a criminal case, under penalty of disbarment, to be a witness against himself, citing the overruled doctrine of *Cohen* v. *Hurley*, 366 U.S. 117. As a matter of law this contention has been fully discussed and not upheld in disciplinary proceedings. (*Matter of Zuckerman* v. *Greason*, 20 N.Y. 2d 430, cert. den. 88 S. Ct. 856; *Matter of Klebanoff*, 21 N.Y. 2d 920, cert. denied 393 U.S. 840; *Sgarlato* v. *Klein*, 22 N.Y. 2d 813, cert. denied 37 L.W. 3193).

Further, this Court in discussing the effects of both the *Garrity* and *Spevack* decisions, had made further refinements as to the meaning and use of the privilege against self-incrimination. In *Gardner* v. *Broderick*, 392 U.S. 273, Mr. Justice Fortas stated:

> "We agree that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunify with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, *the privilege against self-incrimination would not have been a bar to his dismissal.*" (Emphasis supplied)